Supreme Court, U.S.
FILED
98 11 01 NOV 16 1998
OFFICE OF THE CLERK

No _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROHN F. DRYE, JR., SUE C. DRYE, THERESA K. DRYE AND THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, TRUSTEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Daniel M. Traylor
Counsel of Record
Law Offices of Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330
Attorneys for the Petitioners

QUESTION PRESENTED

1. Whether a federal tax lien can attach to a taxpayer's rights in a decedent's estate and thus support a levy and seizure where such rights are non-transferable, without pecuniary value, inchoate and unvested; an are not recognized nor enforceable, at law or in equity, under state law.

PARTIES TO THE PROCEEDING

The Drye Family 1995 Trust, Daniel M. Traylor, Trustee, was plaintiff and counter-defendant in the district court and appellant in the court of appeals. Petitioners Rohn F. Drye, Jr., Sue C. Drye, and Theresa K. Drye were counter-defendants in the district court and appellants in the court of appeals. Respondent United States of America was defendant and counter-plaintiff in the district court and appellee in the court of appeals.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

A. Decisions of the Second And Eighth Circuits Are In Hopeless Conflict With Fifth And Ninth Circuit Decisions On The Vital Matters Of Succession Of Estates And Revenue Collection 5

B. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Present Balance Between Federalism Vs. States Rights Vs. Individual Rights 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Aquilino v. United States, 363 U.S. 509 (1960) 4, 6

Leggett v. United States, 120 F.3d 592 (5th Cir. 1988) 4, 5

Mapes v. United States, 15 F.3d 138 (9th Cir. 1994) 4, 5

United States v. Camparato, 22 F.3d 455 (2d Cir. 1994) 4, 5

United States v. Irvine, 511 U.S. 224 (1994) 6

United States v. Mitchell, 403 U.S. 190 (1971) 6

United States v. National Bank of Commerce, 472 U.S. 713 (1985) 4

Statutes

26 U.S.C. § 6321 4

26 U.S.C § 7426 3

28 U.S.C. § 1346(e) 3

Other Authorities

Uniform Disclaimer of Transfer by Will, Intestacy or Appointment Act, 8A U.C.A. 166, 1993 5

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 152 F.3d 892. The opinion of the district court (Pet. App. 19a-24a) is unpublished.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eighth Circuit was entered on August 17, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S. 1254.

STATUTES INVOLVED

26 U.S.C. § 6331(a)

Ark. Code Ann. § 28-2-101

Ark. Code Ann. § 28-2-102

Ark. Code Ann. § 28-2-108(a)

Ark. Code Ann. § 28-9-203

These provisions are set-forth at pages 30a-33a of the Petitioner's Appendix.

STATEMENT OF THE CASE

On March 13, 1923, petitioner Rohn F. Drye, Jr. was born of the marriage of Irma and Rohn Drye. One of his birthrights was the inchoate privilege to succeed to their intestate estates. Another birthright was the same privilege to renounce or disclaim such a succession. These birthrights are central to the case

In 1988, Mr. Drye suffered the involuntary liquidation of his engineering firm leaving him unable to pay federal income and withholding taxes totaling $240,000. The IRS promptly perfected a federal tax lien against all of Mr. Drye's property and rights to property pursuant to 26 U.S.C § 6321.

On August 3, 1994, his widowed mother Irma died intestate at her home in Pulaski County, Arkansas leaving an estate worth $236,000 of which $158,000 was personalty and $75,000 was the homestead. Irma was survived by her insolvent son and his daughter, petitioner Theresa K. Drye.

On August 17, 1994, Mr. Drye was appointed the personal representative and administrator of his mother's estate by the Pulaski County, Arkansas probate court. On February 4, 1995, Mr. Drye and his wife, petitioner Sue C. Drye, executed, delivered and filed of record a federal and state statutory disclaimer. On March 10, 1995, the probate court found that Mr. Drye had effected a valid disclaimer and ordered final distribution of the estate to Theresa K. Drye. The probate court found that Mr. Drye had no interest in his mother's estate under Arkansas law. Theresa then funded the petitioner spendthrift trust with her assets while granting to the trustee discretionary authority to provide for the health, maintenance and support of Mr. and Mrs. Drye during their lifetime.

Also in March, 1995, Mr. Drye approached the IRS to settle his tax liabilities during which he disclosed his beneficial interest in the trust. However, on April 11, 1996 and without notice, the IRS seized the trust's investment account containing $134,000 and filed of record a notice of federal tax lien against the trust's real estate, Irma's homestead.

On May 1, 1996, the trust filed a wrongful levy action alleging that the IRS had seized its assets without right to satisfy Mr. Drye's federal tax liabilities. Jurisdiction was predicated under 26 U.S.C. § 7426 and 28 U.S.C. § 1346(e). The government counterclaimed against the trust and its beneficiaries seeking, among other things, to confirm its right to seize the trust's personalty and to foreclose its alleged lien against the trust's real estate.

The trust and the government filed cross-motions for summary judgment. The district court granted the government's motion (Pet. App. 19a), and thereafter denied the trust's motion to reconsider its order (Pet. App. 25a).

On July 14, 1997 the district court entered judgment in favor of the government (Pet. App. 28a). It determined that Mr. Drye acquired vested rights to property in his mother's estate at the instant of her death, that federal tax liens attached thereto, and that Mr. Drye's disclaimer was fraudulent (Pet. App. 29a).

The petitioners appealed. A panel of the court of appeals affirmed the district court's judgment and issued its opinion on August 17, 1998 (Pet. App. 1a).

Judge McMillian, writing for the panel, framed the issue as "whether a taxpayer's disclaimer under state law has the legal effect of voiding state law interests in property such that the federal tax liens are incapable of attachment." (Pet. App. 5a).

The decision then reviewed IRC § 6321 and noted that it creates a lien in favor of the United States upon all property and rights to property belonging to any person who has neglected or refused to pay any tax (Pet. App. 6a).

The decision below acknowledged that state law controls in determining the nature of a legal interest which a taxpayer has in property. Aquilino v. United States, 363 U.S. 509, 513 (1960) but that whether a right created under state law constitutes property or rights to property is a matter of federal law. United States v. National Bank of Commerce, 472 U.S. 713, 727 (1985).

Judge McMillian then examined Arkansas state law and concluded that Mr. Drye had a vested right to inherit his mother's estate, that such right constituted property within the meaning of IRC § 6321, that the federal tax lien attached thereto, that the "relation back" provision of the disclaimer statute was a legal fiction incapable of defeasing a federal lien, and that the IRS seizure of the trust's assets was lawful.

The decision below noted that the Fifth and Ninth Circuits had reached an opposite conclusion on facts strikingly similar to those here, but reasoned that these cases were incorrectly decided. The cases are Leggett v. United States, 120 F.3d 592, (5th Cir. 1998) and Mapes v. United States, 15 F.3d 138, (9th Cir. 1994).

REASONS FOR GRANTING THE PETITION

A. Decisions Of The Second And Eighth Circuits Are In Hopeless Conflict With Fifth And Ninth Circuit Decisions On Vital Matters Of Succession Of Estates And Revenue Collection.

This case presents a question of national importance, which was resolved erroneously by the court of appeals. The case is important because the Arkansas probate code and its disclaimer statute are based on uniform acts that are similar to acts in other states (at least 35 by petitioner's count including Texas (Leggett) and Arizona (Mapes)). These states have adopted the acceptance-rejection theory of the succession of estates as opposed to the transfer theory.

The acceptance-rejection theory of disclaimer is adopted by the Uniform Disclaimer of Transfer by Will, Intestacy, or Appointment Act, 8A U.C.A. 166 (1993) and follows from the common law principle that a gift is a bilateral transaction, requiring not only a donor's intent to give, but also a donee's acceptance. Here, Mr. Drye declined to accept his mother's estate and exercised his personal right of decision to disclaim. The decision below embraces the transfer theory, clearly not the law of the State of Arkansas. The decision below labels petitioners as parties to a fraudulent transfer, including unwittingly, the Arkansas probate court judge.

Now is the appropriate time for the Court to address this issue. The opinion below relied heavily on United States v. Comparato, 22 F.3d, 455, a 1994 second circuit decision that held a disclaimer was rendered ineffective by a federal tax lien. Comparato is easily distinguishable since the disclaimer there was filed more than seven years after the devisor's death but it illustrates the disparate treatment and conflict between the several circuits.

B. The Decision Below Is Inconsistent With This Court's Decisions And Jeopardizes The Present Balance Between Federalism Vs. States Rights Vs. Individual Rights

This will be a case of first impression should the Court grant this petition, however from decisions in related cases the ruling below should be reversed. For example in United States v. Irvine, 511 U.S. 224, 239-40 (1994) the Court recognized that the right to disclaim might, under state law, be based on the acceptance-rejection theory, and therefore, not be a legal fiction. The decision below rejects the Court's advise on this critical issue.

Moreover, the decision below has the effect of gutting Aquilino and United States v. Mitchell, 403 U.S. 190 (1971) which teach that an in-depth analysis should be made of state law to ascertain IRC § 6321 property and rights to property. The decision below has a state law analysis that is shallow and cursory at best, and effectively strips the states of their traditional power to define property rights.

Pealed to their core, Mr. Drye's disclaimer was either a fraudulent transfer or the lawful exercise of a personal right of decision. Can a person be made an owner without his consent? Only this Court can settle the issue.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

Daniel M. Traylor
Counsel of Record
Law Offices of Daniel M. Traylor
900 West Third Street
Little Rock, AR 72201
(501) 372-3330

Attorneys for the Petitioners
November 16, 1998

APPENDIX

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Eighth Circuit Filed August 17, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Eastern District Of Arkansas, Western Division Granting Motion For Summary Judgment Dated And Filed February 25, 1997 ..... 19a

Appendix C — Order Of The United States District Court For The Eastern District Of Arkansas, Western Division Denying Petitioner's Motion For Reconsideration Dated And Filed April 4, 1997 ..... 25a

Appendix D — Judgment Of The United States District Court For The Eastern District Of Arkansas, Western Division Dated July 14, 1997 ..... 28a

Appendix E — Relevant Statutes 30a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 17, 1998

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3249

Drye Family 1995 Trust;
Daniel M. Traylor, Trustee,

Appellants,

v.

United States of America,

Appellee.

United States of America,

Appellee,

v.

Drye Family 1995 Trust; Daniel M. Traylor; Rohn F. Drye; Sue C. Drye, Theresa K. Drye,

Appellants.

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: April 15, 1998
Filed: August 17, 1998

Before BOWMAN[1], Chief Judge, and McMILLIAN and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

The Drye Family 1995 Trust, Daniel M. Traylor, Rohn F. Drye, Jr., Sue C. Drye, and Theresa K. Drye (collectively, appellants) appeal from a final judgment entered in the United States District Court[2] for the Eastern District of Arkansas in favor of the United States of America (hereinafter, the government) on its counterclaim to reduce certain tax assessments to judgment. *Drye Family 1995 Trust v. United States*, No. LR-C-96-346 (E.D. Ark. July 14, 1997) (judgment). For reversal, appellants contend that the district court erred in failing to hold that a taxpayer's disclaimer under Arkansas law has the legal effect of voiding interests created under Arkansas law such that federal tax liens are incapable of attachment. For the reasons discussed herein, we affirm.

Jurisdiction

The district court had jurisdiction over the underlying wrongful levy action pursuant to 26 U.S.C. § 7426, which waives sovereign immunity to allow such suits, and 28 U.S.C. § 1346(e), which grants subject matter jurisdiction over such suits. The district court also had jurisdiction over the government's counterclaim pursuant to 26 U.S.C. § 7402(a) and 28 U.S.C. §§ 1340, 1346(c). Jurisdiction on appeal is proper under 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure.

---

1. The Honorable Pasco M. Bowman succeeded the Honorable Richard S. Arnold as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on April 17, 1998.

2. The Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas.

Facts

The relevant facts are undisputed. On August 3, 1994, Irma Deliah Drye died intestate at her home in Pulaski County, Arkansas, leaving an estate worth approximately $236,000.00, of which $158,000.00 was personalty and $75,000.00 was realty located in Pulaski County, Arkansas. Ms. Drye was survived by her son and sole heir-at-law, Rohn F. Drye, Jr. (Drye), and his daughter, Theresa K. Drye. On the date of his mother's death, Drye was insolvent and owed the government approximately $325,000.00 representing assessments for tax years 1988, 1989, and 1990. The Internal Revenue Service (IRS) had made assessments against Drye in November 1990 and May 1991 and had valid tax liens against all of Drye's property or rights to property pursuant to 26 U.S.C. §§ 6321 and 6322 of the Internal Revenue Code (the Code).

On August 17, 1994, Drye was appointed the Personal Representative and Administrator of his mother's estate in Pulaski County Probate No. 94-1440. Drye resigned from that position on February 6, 1995. Before resigning, Drye filed in the probate court and the land records of Pulaski County an instrument dated February 4, 1995, entitled "Disclaimer and Consent" to disclaim all interests in his mother's estate.[3] Also, on or about February 4, 1995, Theresa Drye created The Drye Family 1995 Trust (the Trust). Theresa Drye was appointed Successor Personal Representative and Administratrix of Irma Deliah Drye's estate on February 8, 1995.

On March 10, 1995, the Probate Court found that Drye had effected a valid disclaimer of his mother's estate under Arkansas law and ordered final distribution of the estate to Theresa Drye. Theresa Drye then funded the Trust with her

---

3. Pursuant to Ark. Code Ann. § 28-2-109(b), Sue C. Drye, Drye's wife, joined in the election of the disclaimer in order to consent to the disclaiming of any dower or homestead interests that she might have had.

interest in the estate. The Trust's beneficiaries are Theresa Drye and, during their lifetimes, Drye and his wife, Sue C. Drye. Pursuant to the terms of the Trust, distributions are at the discretion of the trustee, Daniel M. Traylor, and may be made only for the health, maintenance, and support of the beneficiaries. The Trust is spendthrift and, therefore, its assets cannot be attached by state law creditors to satisfy the debts of its beneficiaries.

On April 18, 1995, the Trust opened an investment account at Stephens, Inc., an investment banking organization which managed the account in the name of the Trust. Also in 1995, Drye began negotiations with the IRS regarding his tax liabilities during the course of which he revealed his beneficial interest in the Trust. On April 11, 1996, the IRS filed in the office of the Pulaski County, Arkansas, Circuit Clerk and Recorder a Form 668 Notice of Federal Tax Lien against the Trust as Drye's nominee and, subsequently, served a Notice of Levy on Stephens, Inc. and notified the Trust of the levy.

The Trust brought the underlying wrongful levy action on May 1, 1996, alleging that the IRS had unlawfully levied its property to satisfy Drye's federal tax liabilities and seeking, among other things, injunctive relief. On May 2, 1996, Stephens, Inc. paid over to the IRS $134,004.33 representing the account's proceeds. On June 28, 1996, the government filed a counterclaim against the Trust, the trustee, and the trust beneficiaries seeking, among other things, to reduce to judgment the tax assessments against Drye, confirm its right to seize the Trust's assets in collection of those debts, foreclose on its liens and sell the Trust property. The Trust and the government filed cross-motions for summary judgment.[4] The district court

4. On or about January 17, 1997, the Trust served on the government a motion for summary judgment but inadvertently omitted to file that motion with the district court. The district court later granted the Trust's motion to accept the filing of the motion for summary judgment pursuant to Fed. R. Civ. P. 60(b).

the government's motion for summary judgment, *id.* at 6 (Feb. 25, 1997), and thereafter denied Drye's motion to reconsider its order. *Id.* at 2 (April 4, 1997).

On July 14, 1997, the district court entered final judgment in favor of the government and against the Trust and the counterclaim defendants. In addition, that judgment (1) dismissed with prejudice the complaint of the Trust and the trustee; (2) reduced to judgment assessments against Drye for $220,980.00, plus statutory interest, for the last quarters of 1988 and 1989 and the first quarter of 1990, and assessments against Drye for $91,952.00, plus statutory additions to tax, for 1988; (3) determined that the government had valid tax liens against all of Drye's property and rights to property including the personalty and realty conveyed in the estate (particularly the funds seized by levy from Stephen's, Inc., and the real property in Pulaski County); (4) determined that Drye's disclaimer was invalid, null, and void, and fraudulent against the United States, and that the Trust was merely Drye's nominee or alter ego; and (5) ordered the foreclosure of the federal tax liens, the sale of the real property, and the application of the sale proceeds and of the funds seized by levy in satisfaction of the assessments against Drye. *Id.* at 1-3 (July 14, 1997) (judgment). This appeal followed.

Discussion

This appeal presents a narrow, but not uncomplicated, legal issue that conjoins state laws of inheritance and federal tax law, and one that has fomented a split among three federal courts of appeal.[5] The issue is whether a taxpayer's disclaimer under state law has the legal effect of voiding state law interests in property such that federal tax liens are incapable of attachment. The law of Arkansas is the applicable state law in the instant

5. *Leggett v. United States*, 120 F.3d 592, 598 (5th Cir. 1997) (state law disclaimer of right to accept or reject property defeated attachment of federal tax liens); *United States v. Comparato*, 22 F.3d 455 (2d Cir. 1994) (state law disclaimer ineffective against federal tax liens); *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994) (state law disclaimer defeated attachment of federal tax liens).

case. We review *de novo* the district court's interpretation and application of both federal and state law. *Norwest Bank North Dakota, N.A. v. Doth*, No. 97-3113, 1998 WL 432471, at *4 (8th Cir. July 31, 1988) (federal law); *Salve Regina College v. Russell*, 499 U.S. 231 (1991) (state law); *Lindsay Mfg. Co. v. Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1267 (8th Cir. 1997) (same).

Section 6321 of the Internal Revenue Code creates a lien in favor of the United States upon *all property and rights to property*, whether real or personal, belonging to any person who has neglected or refused to pay any tax (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) after demand has been made. 26 U.S.C. § 6321. " '[S]tate law controls in determining the nature of the legal interest which the taxpayer had in the property.' " *Aquilino v. United States*, 363 U.S. 509, 513 (1960) (*Aquilino*) (quoting *Morgan v. Commissioner*, 309 U.S. 78, 82 (1940)). However, whether a right or interest created under state law "constitutes 'property' or 'rights to property' is a matter of federal law." *United States v. National Bank of Commerce*, 472 U.S. 713, 727 (1985) (*Bank of Commerce*) (citing United States v. Bess, 357 U.S. 51, 56-57 (1958) (*Bess*)). " '[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [§ 6321], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *Bank of Commerce*, 472 U.S. at 722 (quoting *Bess*, 357 U.S. at 56- 57); *see also United States v. Mitchell*, 403 U.S. 190, 197 (1971) (*Mitchell*) ("[S]tate law creates legal interests but the federal statute determines when and how they shall be taxed.") (emphasis added) (citations omitted); *United States v. Solheim*, 953 F.2d 379, 382 (8th Cir. 1992) (*Solheim*) ("Once the tax lien has attached to the taxpayer's state-created interest, federal law applies.") (citing *Aquilino*, 363 U.S. at 513-14)). This bifurcated application of state and federal law derives from the fact that the federal statute "creates no property rights

but merely attaches consequences, federally defined, to rights created under state law." *Bess*, 357 U.S. at 55 (holding in bankruptcy context that state law that "[an] insured's property right represented by the cash surrender value [of a life insurance policy] is not subject to creditors' liens' was irrelevant" to whether federal tax lien could attach).

The Code does not define "property" or "rights to property" as those terms are used in § 6321. The Supreme Court has held that Congress's language with respect to those terms "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. . . . 'Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes.' " *Bank of Commerce*, 472 U.S. at 719-20 (quoting *Glass City Bank v. United States*, 326 U.S. 265, 267 (1945)) (other citations omitted). *But cf. Leggett v. United States*, 120 F.3d 592, 598 (5th Cir. 1997) (*Leggett*) (suggesting that Congress's failure to define property more broadly than state law does (as is the case in the gift tax provisions of the Code) or to expressly prohibit taxpayers from filing disclaimers precludes an expansive reading of § 6321). In enforcing § 6321, appellate courts have interpreted "property" or "rights to property" to mean state-law rights or interests that have pecuniary value and are transferable. *See, e.g., United v. Stonehill*, 83 F.3d 1156, 1159-60 (9th Cir.) (Stonehill) (holding that a chose-in-action is "property" or a "right to property" under § 6321 in light of its pecuniary value and transferability), *cert. denied*, 117 S. Ct. 480 (1996); *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992) (Kimura) (holding that liquor license is subject to § 6321 lien because it has independent value and sufficient transferability); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-72 (6th Cir. 1990) (*Terwilliger's Catering Plus*) (same); *21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F.2d 354, 357-58 (3d Cir. 1986) (*21 West Lancaster Corp.*) (noting that federal tax lien may attach to liquor license because license has value and transferability, notwithstanding fact that, under

state law, license is not property or subject to a security interest); *Southern Bank v. IRS*, 770 F.2d 1001, 1005 (11th Cir. 1985) (*Southern Bank*) (holding that an equitable right of redemption constitutes "property" or "right to property" under § 6321 because it has pecuniary value and is transferable).

Under Arkansas law the right to inherit has pecuniary value, *see, e.g., Bransford v. Jones*, 679 S.W.2d 798, 799 (Ark. 1984) (holding that heirs to intestate part of residual portion of estate who were also specific legatees to a bequest had a right to post-judgment interest on intestate share), and is transferable. *See Clark v. Rutherford*, 298 S.W.2d 327, 330 (Ark. 1957) (upholding conveyance, through assignment, of expectancy in mother's estate); *Hutchison v. Sheppard*, 279 S.W.2d 33, 38 (Ark. 1955) (recognizing conveyance of an "entire interest" in land irrespective of whether heir had received by will or by intestacy a share in the reversionary estate or whether conveyance preceded decedent's death); *Bradley Lumber Co. v. Burbridge*, 210 S.W.2d 284, 288 (Ark. 1948) (reasserting that, although unenforceable at law, assignments of expectancies by prospective heirs have generally been upheld in courts of equity); *Leggett v. Martin*, 156 S.W.2d 71, 74-75 (Ark. 1941) (holding that expectant heirs may release to an ancestor for adequate consideration their anticipated interests in that ancestor's estate); *Felton v. Brown*, 145 S.W. 552, 554 (Ark. 1912) (same). The Arkansas Probate Code provides that an heir may disclaim, in whole or in part, an intestate interest in or right to a heritable estate within nine months of the decedent's death. Ark. Code Ann. §§ 28-2-101 & 28-2-107(a)(1). The Arkansas Probate Code further provides that a disclaimer effected under these provisions creates the legal fiction that the disclaimant predeceased the decedent and "relates back for all purposes to the date of death of the decedent." *Id.* § 28-2-108(a)(1) & (3) (emphasis added).

Appellants contend that, in light of Drye's legally valid disclaimer, Drye never had a property interest in his mother's

estate to which federal liens could attach. Specifically, appellants argue that the "relation back" provision in the disclaimer statute has the effect of completely nullifying any state law right to intestate succession that Drye might once have had. Appellants urge this court either to reverse the district court's denial of their motion for summary judgment in favor of the government or to certify to the Arkansas Supreme Court the question of what effect, if any, the "relation back" doctrine has on federal tax liens.

The government maintains that the federal tax liens attached to Drye's interest in his mother's estate on the date of her death and that the subsequent disclaimer was ineffective to remove them. The government further argues that, because Drye's right to intestate succession has pecuniary value and is transferable, it constitutes "property" or "rights to property" under § 6321 and was automatically subject to attachment by the preexisting federal tax liens. In addition, the government argues that the transfer of the estate's assets to the Trust constitutes a fraudulent conveyance because the Trust is Drye's nominee or alter ego.[6]

The Second, Ninth, and Fifth Circuits addressed similar arguments in determining the effect of a state law disclaimer on preexisting federal tax liens and reached differing results. In *Leggett*, the most recent case, the Fifth Circuit determined that a disclaimer under Texas law nullifies any interest that the disclaimant has in the property, thereby defeating the attachment of federal tax liens. 120 F.3d at 596. As in the instant case, the IRS had made assessments against a taxpayer and acquired a lien against all of her property and rights to property pursuant to § 6321 when her aunt died testate, leaving the taxpayer a one-twentieth interest in her estate. *Id.* at 593. The taxpayer subsequently disclaimed her entire interest in the estate pursuant to Texas's disclaimer statute and sought a declaration

6. The government briefed this issue below but the district court did not reach it.

that the IRS had no lien against the estate's property in view of the disclaimer. *Id.* The district court ruled in favor of the IRS on the ground that Texas law creates only a right to accept or reject inheritance; that is, the taxpayer merely had a right of decision which does not constitute a property right under state law. *Id.* at 596. The Fifth Circuit reversed, applying Texas law to determine whether the state-law right constituted "property or rights to property" under § 6321. *Id.* at 594 ("[S]tate law determines whether a taxpayer has a property interest to which a federal lien may attach. . . . Therefore, we must decide whether, under Texas law, [the taxpayer] ever had a property interest in [the subject] estate.") (citations omitted). Reading the Texas Probate Code's vesting and disclaimer provisions together, the Fifth Circuit concluded that " 'a bequest or gift is nothing more than an offer which can be accepted [by taking possession, exercising dominion, or taking no action within the set time] or rejected [by timely filing a disclaimer].' " *Id.* at 595-96 (citing Texas authority). Furthermore, the Fifth Circuit distinguished its holding from a contrary holding in *United States v. Comparato*, 22 F.3d 455 (2d Cir. 1994) (Comparato), on the ground that New York law is substantially different from Texas law and from Arizona law, which was applied in *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994) (*Mapes*). *Leggett*, 120 F.3d at 596-97.

In *Mapes*, the taxpayer's mother died, leaving him half of her estate. 15 F.3d at 139. In order to prevent preexisting federal tax liens from attaching to his interest in the estate, the taxpayer renounced his interest in favor of his children pursuant to Arizona's Probate Code.[7] *Id.* at 140. The district court's ruled in favor of the government and against the taxpayer's children in their wrongful levy action. *Id.* at 141. The Ninth Circuit reversed, holding that "state law, not federal law" determined

7. Like the Arkansas Probate Code's disclaimer provisions, the disclaimer provisions of the Arizona Probate Code have not been interpreted in a reported Arizona State Court opinion or federal court opinion.

"whether [the taxpayer] had any interest in property, lienable or not." *Id.* at 140. From this premise, the court concluded that the taxpayer did not have an interest under state law because the effect of the taxpayer's proper and timely renunciation was to prevent him from acquiring any interest to which a federal tax lien could have attached. *Id.* at 140-41. The court further held that the taxpayer's renunciation was not compromised by his temporary use of part of the estate (a vehicle, constituting one percent of the value of the estate) in order to prevent its loss or theft. *Id.* at 141.

As noted above, the Second Circuit reached a contrary result in *Comparato*. *Comparato* involved the estate of a quadriplegic who died intestate in 1984, leaving his parents, the Comparatos, as his statutory distributees. 22 F.3d at 456. In 1989 Anthony Comparato, the decedent's father, petitioned the Surrogate's Court to approve the settlement of a malpractice action that decedent had commenced before his death and a derivative wrongful death claim, and to distribute the proceeds equally between himself and his wife as the decedent's heirs. *Id.* In August 1989, before the Surrogate Court disposed of the petition, the IRS served notice of levy on the decedent's estate in the amount of the Comparatos' tax liability. *Id.* The Comparatos executed separate, untimely renunciations of their respective interests in their son's estate on April 10, 1991, which the Surrogate Court permitted them to file on September 23, 1991. *Id.* In 1992 the government commenced an action in the district court to reduce to judgment the assessments against the Comparatos. *Id.* The district court held that the Comparatos acquired property interests in the proceeds of the malpractice claims on the date of their son's death and that the preexisting federal tax liens attached to the interests prior to the Comparatos' renunciation. *Id.* at 458. The Second Circuit affirmed, holding that, under New York law, the Comparatos' interests vested upon their son's death, thereby obviating any analysis of the retroactive effect of the renunciation. *Id.* at 457-58. "[O]nce state law provided [the Comparatos] with a vested

interest in the proceeds of the malpractice actions, federal law controlled whether their interests were exempt from levy by the United States." *Id.* at 458 (citing *United States v. Rodgers*, 461 U.S. 677, 683 (1983)). Applying federal law, the court further determined that the express terms of the Code precluded any determination that the Comparatos' interests were exempt from levy by operation of a state law. *Id.* (citing 26 U.S.C. § 6334).

We agree with the conclusion reached in *Comparato*.[8] The central question undergirding each circuit court's analysis is what law applies: Is a federal court bound by state law governing disclaimers and the "relation back" thereof or does federal law governing the attachment of liens apply? *Leggett* concludes that "state law determines whether a taxpayer has a property interest to which a federal lien may attach." *See Leggett*, 120 F.3d at 594. Similarly, *Mapes* holds that state law concerning property interests and disclaimers determine whether a taxpayer has "property" or a "right to property." *Mapes*, 15 F.3d at 140. However, as we noted earlier, the Supreme Court has pronounced that "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," *Bess*, 357 U.S. at 56-57, and that "[w]hether a state-law right constitutes 'property' or 'rights to property' *is a matter of federal law*.' " *Bank of Commerce*, 472 U.S. at 727 (emphasis added). The principle that emerges from these seemingly contradictory statements is that state law determines whether a given set of circumstances creates a right or interest; federal

8. *Comparato* appears to be factually distinguishable from the instant case because the Comparatos disclaimed their vested interest in the proceedings approximately seven years after the disclaimer period. However, the timeliness of the disclaimer did not drive the court's decision in *Comparato*. Rather, the court relied mainly on the fact that Congress did not specifically exempt from § 6321 levy property that state law has made exempt from state levy. *See United States v. Comparato*, 22 F.3d 455, 458 (2d Cir. 1994).

law then dictates whether that right or interest constitutes "property" or the "right to property" under § 6321. The concomitant state law consequences of a state law interest or right "are of no concern to the operation of the federal tax law." *Id.* at 723.

By extension, we hold that the state law consequences of Drye's right to his mother's estate, namely, the legal fiction that is created through Drye's disclaimer under Ark. Stat. Ann. § 28-2- 101 *et seq.*, is "of no concern to the operation of the federal tax law." *Cf. Bess*, 357 U.S. at 57 ("Such state laws 'are not laws for the United States . . . unless they have been made such by Congress itself.' ") (quoting *Fink v. O'Neil*, 106 U.S. 272, 276 (1882) (concerning bankruptcy liens)); *Leggett*, 120 F.3d at 596 ("The view that the disclaimer is a legal fiction . . . supports the holding that property right existed before the disclaimer."); *Terwilliger's Catering Plus*, 911 F.2d at 1171-72 ("Although it is true that the state has the right to decide what property interests it wishes to create, it cannot thwart the operation of the Tax Code by classifying the interests it has created as something other than property rights."). Under this view, we conclude that the preexisting federal tax liens attached to Drye's state law right to his intestate share which vested on or about the time of his mother's death. *See, e.g., Keenan v. Peevy*, 590 S.W.2d 259, 269-70 (Ark. 1979) (holding that the title to real property vests immediately upon death of owner if heirs take through intestate succession, subject to appropriate provisions for administration under the probate code and subject to widow's dower and homestead rights, if any); *Dean v. Brown*, 227 S.W.2d 623, 628 (1950) (deciding under prior law that the personalty of an intestate became vested in the personal representative when appointed and remained so vested until distribution upon proper order of the probate court); *see also* Ark. Stat. Ann. § 28-9-203(c) ("Real estate passes immediately to the heirs upon the death of the intestate . . . . However, personalty will pass to the personal representative, if any, for distribution to the heirs . . . .").

Appellants suggest that Drye cannot be forced to "accept" his share of the estate. Brief of Appellants at 4. We disagree. Although the Arkansas disclaimer statute provides that "an *acceptance* of the property or interest of a benefit thereunder" constitutes a bar to the right to disclaim property or an interest in property, Ark. Code. Ann. § 28-2-102, (thereby supporting inferentially appellants' argument), we conclude that "acceptance" in this context is a term of art particular to the issue of state law disclaimer which we have already rejected as irrelevant to our analysis. *But see Leggett*, 120 F.3d at 595-97; *cf. Mapes*, 15 F.3d at 141 (holding that the taxpayer's use of the estate's property prior to disclaimer was *de minimis* and thus did not constitute acceptance of benefits from the property). In actuality, if Drye did nothing, he still had an interest in the estate as the sole heir-at-law. Subject to the administration of the estate, that interest is enforceable and transferable upon the death of Irma Deliah Drye and, more important, during the nine-month disclaimer period. Moreover, it is the existence of Drye's right to a share of his mother's estate that allowed him the right under state law to disclaim the estate; in other words, Drye's mere ability to invoke a legal fiction under state law that has the effect of redirecting the succession of the estate reifies his state law interest in the estate. Unfortunately for Drye, our inquiry regarding his rights under state law terminates upon identifying this elementary interest. The "relation back" of Drye's disclaimer is therefore of no effect to our analysis.

As a matter of federal law, Drye's state law right to inherit his mother's estate is a "right to property" under § 6321 because that right has pecuniary value (the estate was valued at approximately $233,000 minus administrative expenses) and is transferable. *See, e.g., Stonehill*, 83 F.3d at 1159-60; *Kimura*, 969 F.2d at 810; *Terwilliger's Catering Plus*, 911 F.2d at 1171-72; *21 West Lancaster Corp.*, 790 F.2d at 357-58; *Southern Bank*, 770 F.2d at 1005. In light of the foregoing, we hold that Drye's state law interest in the estate of his mother is subject to the "federal consequence" of the preexisting tax liens, irrespective of Drye's subsequent disclaimer of that interest under state law.

To be sure, there are policy considerations that arguably militate in favor of an opposite result. In *Leggett*, the Fifth Circuit provided a thoughtful analysis of some of these considerations. At common law, beneficiaries could accept or reject a legacy or devise on the theory that no person can be made an owner without his or her consent; heirs could not. *Leggett*, 120 F.3d at 595-96. We agree with the Fifth Circuit's conclusion that the purpose of disclaimer law is to rectify the disparate tax treatment that resulted from this distinction whereby disclaiming beneficiaries were not subject to gift tax liability while disclaiming heirs were. *See id.* However, under the Fifth Circuit's reasoning, limiting the application of state law disclaimers to state tax liability goes against the spirit and purpose of disclaimer laws. We find, however, that the Supreme Court's instruction that "state-law consequences of [a state-law defined interest] are of no concern to the operation of the federal tax law" and its express limitation of the role of state law in determining federal tax liability under § 6321 counsel against interpreting broadly the scope of state disclaimer laws. State disclaimer statutes may fulfill their intended purpose with respect to state tax liability but cannot affect federal tax consequences.

Furthermore, holding that state law disclaimers can defeat federal tax liability ignores the clear intent of Congress embodied in the broad scope of § 6321. The purpose of § 6321 is to reach any and all interests of pecuniary value to which a taxpayer may be entitled in order to satisfy outstanding tax liability. It follows, therefore, that Congress did not intend that taxpayers have the prerogative to relinquish rights in property in favor of avoiding tax liability. *See Bank of Commerce*, 472 U.S. at 723-25 (holding that "[c]ommon sense dictates" that taxpayer's unqualified, unrestricted, and absolute right under state law and his bank contract to compel payment of outstanding balances in two accounts constitutes property [or] rights to property under §§ 6331 and 6332); *United States v. First Nat'l Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970) ("[I]t

is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer[].") (quoted in *Bank of Commerce*, 472 U.S. at 726); cf. *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1302 (8th Cir. 1980) ("The unqualified contractual right to receive property is itself a property right subject to seizure by [§ 6321] levy, even though the right to payment of the installments has not matured at the time of the levy.").

Section 6334 of the Internal Revenue Code also convinces us of Congress's intention to reach property and rights to property disclaimed under state law. Section 6334 specifically exempts certain property or rights to property from the ambit of the Code's levy provisions. 26 U.S.C. § 6334(a). Property or rights to property disclaimed under state law are not included in the list of exempt property. Subsection (c) expressly provides that the list is exhaustive. *Id.* § 6334(c) ("[N]o property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."); *see also Mitchell*, 403 U.S. at 205 (holding that § 6334(c) is specific and clear and provides "no room . . . for automatic exemption of property that happens to be exempt from state levy under state law"); *Comparato*, 22 F.3d at 458 (relying on exhaustive list of exempt property in § 6334(a) as evidence of Congress's intent not to exempt property taxpayers renounced under state law). Accordingly, Congress's failure to exclude property exempt from levy under state law is indicative of its intention that such property be subject to federal levy. *Cf. In re Detlefsen*, 610 F.2d 512, 515 (8th Cir. 1979) (*Detlefsen*) (holding that under § 70(a) of the old Bankruptcy Act, a post-petition state law disclaimer defeated federal liens, but recognizing that the more expansive language anticipated in the new bankruptcy code would obviate this question by expanding the definition of property and thus the scope of federal liens); Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 Loy. U. Chi. L.J. 31, 37-39 (1993) (discussing

Detlefsen and noting that courts that have reviewed the same issue under the new bankruptcy code "have in fact reached the different result referred to by the Detlefsen court"). Finally, we would be remiss in setting forth our analysis, if we failed to note that Drye's retention of a life estate in the Trust, which was funded in large part if not entirely by the disclaimed property, gives us considerable pause.

Considered in their totality, these factors clearly outweigh, and obviate consideration of, the goal of state disclaimer statutes to equalize the gift tax consequences between intestate and probate heirs. Thus, having determined that Drye's right to his intestate share of his mother's estate is property or a right to property within the meaning of § 6321 and assuming for purposes of analysis that Drye's disclaimer was properly executed under Arkansas law, we further conclude that the only relevant legal effect of Drye's disclaimer is to direct the proceeds of the estate to his daughter subject to the federal liens. The liens pass *cum onere* with the estate until they are satisfied or become unenforceable. *See* 26 U.S.C. § 6322 (unless otherwise provided by law, a lien imposed by § 6321 arises at the time of assessment and continues until the liability for the assessed amount "(or judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time"); *cf. Bess*, 357 U.S. at 57 (referring to liens under bankruptcy code). The liens are, therefore, enforceable against the Trust and the trust beneficiaries to the extent that they are heretofore unpaid.

Conclusion

Peeled to their core, Drye's efforts to bind the IRS by the legal fiction created under Arkansas's disclaimer statute were unfruitful. For the reasons stated in this opinion, we affirm the judgment of the district court granting summary judgment in favor of the government and denying appellants' motion for

summary judgment. In light of the foregoing, we do not reach the government's argument that the disclaimer effected a fraudulent conveyance.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION GRANTING MOTION FOR SUMMARY JUDGMENT DATED AND FILED FEBRUARY 25, 1997

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-96-346

THE DRYE FAMILY 1995 TRUST and
DANIEL M. TRAYLOR, Trustee

PLAINTIFFS

v.

THE UNITED STATES OF AMERICA

DEFENDANT/ COUNTERCLAIM PLAINTIFF

v.

THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, as Trustee, ROHN F. DRYE, SUE C. DRYE, and THERESA K. DRYE

COUNTERCLAIM DEFENDANTS

ORDER

On January 29th, the United States filed a motion for summary judgment supported by brief, a statement of facts and exhibits. Plaintiffs have not responded.

Appendix B

Summary judgment can properly be entered when there are no genuine facts that can be resoived by a finder of fact; that is, there are no facts which could reasonably be resolved in favor of either party. The Court must, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512 (1.986). The non-moving party may not just rest upon his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986); Civil Procedure Rule 56. "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law." *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989).

Local Rule C-10 provides that a party moving for summary judgment must file a separate, short and concise statement of material facts as to which it contends there is no genuine issue to be tried. The rule further provides that unless the non-moving party files a separate, short and concise statement of the material facts as to which it contends a genuine issue exists to be tried, all material facts set forth in the moving party's statement will be deemed admitted.

The following facts are admitted:

1. On the dates and in the amounts listed below, a duly authorized delegate of the Secretary of the Treasury, in accordance with law, timely assessed federal income taxes and trust fund recovery penalties (TFRP), plus additions to tax and statutory interest against the taxpayer as follows:

Appendix B

Type of Tax	Period	Assessment Date	Amount	Lien Date Notice
TFRP	8812	11/26/90	$ 25,799	3/25/91
TFRP	8912	11/05/90	188,480	3/25/91
TFRP	9003	11/26/90	6,701	3/25/91
Income	8812	05/01/91	91,952	1/28/92

2. Notices of the assessments described in paragraph 1 were sent to the taxpayer by a delegate of the Secretary of the Treasury in accordance with law.

3. Despite notice and demand, the taxpayer has refused or neglected to pay the full amount of the assessments penalty described in paragraph 1.

4. Notices of federal tax lien have been filed with the Pulaski County Recorder relative to the assessments described in paragraph 1, in the name of The Drye Family 1995 Trust as the nominee of Rohn F. Drye, Jr.

5. On August 3, 1994, the taxpayer's mother, Irma Deliah Drye ("Decedent"), died intestate.

6. Decedent was survived by the taxpayer and his daughter, Theresa K. Drye ("Theresa Drye").

7. The taxpayer was appointed Personal Representative and Administrator of the decedent's estate.

8. On February 6, 1995, the taxpayer filed a "Disclaimer and Consent" by which he purported to disclaim any interest in the Decent's estate, purporting to leave Theresa Drye as the sole heir of the estate and all property included therein, including the personal property seized by IRS levy and the real property more fully described in paragraph 9.

9. The real property which is the subject matter of this action is located in Pulaski County, Arkansas, within the jurisdiction of this Court and is more-particularly described as follows:

> The W1/2 of the SW1/4 of the SE1/4 of the SW1/4, Section 31, Township 3 north, Range 11 West, less and except the North 3 acres thereof.

10. The disclaimer was made without adequate consideration.

11. At the time the taxpayer executed the purported disclaimer he was insolvent.

12. At the time of the disclaimer and purported transfer of the subject property to the Drye 1995 Family Trust, the tax liabilities referred to in paragraph 10 above, were due and owing to the United States, had been assessed, and notice of federal tax liens had been filed. Accordingly, the disclaimer and transfer were made subject to the pre-existing tax liens.

13. On February 6, 1995, the taxpayer resigned as personal Representative and Administrator of the decedent's estate.

14. By order dated February 8, 1995, Theresa Drye was appointed Successor Personal Representative and Administratrix.

15. On or about February 4, 1995, Theresa Drye purported to convey the estate property to the Drye Family 1995 Trust.

16. The beneficiaries of the trust are the taxpayer, the taxpayer's wife, Sue. C. Drye, and Theresa Drye.

17. The trustee of the Drye Family 1995 Trust is Daniel M. Traylor.

18. On April 11, 1996, the Internal Revenue Service served a Notice of Levy on Stephens, Inc. in order to collect the unpaid Trust Fund Recovery Penalty and individual federal income tax liabilities of Rohn F. Drye, Jr.

19. Stephens, Inc. is an investment banking organization, which managed an investment account in the name of the trust.

20. On May 2, 1996, Stephens, Inc. paid over $134,004.33 to the IRS.

21. On May 1, 1996, the plaintiffs filed suit against the United States alleging that the IRS had wrongfully levied on the funds held by Stephens and requesting that this Court release the federal tax lien filed against the Drye Family Homestead.

22. On June 28, 1996, the United States filed an answer and counterclaim denying the plaintiffs' allegations and requesting that this Court foreclose the federal tax liens against the real and personal property and order a sale of said property.

The United States has correctly applied the relevant law in establishing that taxpayer Drye obtained a vested interest in the estate property of his mother upon her death to which the federal tax liens properly attached so that the state disclaimer law that was later invoked was incapable of removing those federal liens. See, *United States v. Comparato*, 22 F.3d 455 (2nd Cir. 1994); *Estate of Leggett v. United States*, 1996 WL 604485, 78 A.F.T.R.2d 96-6334 (S.D. Tex. 1996); *Tinari v. United States*, 78 A.F.T.R.2d 96-63 81 (E.D. Penn. 1996).

Hence, the United states properly levied against the personalty at issue and is entitled to foreclose its lien against the real property at issue. Plaintiffs are not entitled to any relief.

Accordingly, the United States, January 29th motion for summary judgment (#6) is granted. The United States is directed

Appendix B

to submit a precedent for judgment granting the relief requested by the counterclaim within 20 days of the file-date of this order.

IT IS SO ORDERED this 25 day of February, 1997.

s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DENYING PETITIONER'S MOTION FOR RECONSIDERATION DATED AND FILED APRIL 4, 1997

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-96-346

THE DRYE FAMILY 1995 TRUST, and
DANIEL M. TRAYLOR, Trustee

PLAINTIFFS

v.

THE UNITED STATES OF AMERICA -

DEFENDANT/COUNTERCLAIM PLAINTIFF

v.

THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR, Trustee, ROHN F. DRYE, SUE C. DRYE, and THERESA K. DRYE

COUNTERCLAIM DEFENDANTS

ORDER

By order filed on February 25th, the Court granted summary judgment in favor of the United States and directed that a precedent for judgment in accordance with that order be submitted. On March 18th, plaintiff filed a motion for relief

pursuant to Civil Procedure Rule 60(h) on the ground that while a motion for summary judgment had been prepared and served on defendant on January 17th, the original was inadvertently not filed with the Clerk. Plaintiff agrees that the facts contained in Paragraphs 1 through 22 of that order are admitted, but asserts that the "relation back" of the Arkansas disclaimer law prevented Rohn from acquiring any interest — the defeasible fee simple interest with respect to the real property and an expectancy interest with respect to personalty — in his mother's estate so the levy was wrongful. Plaintiff requests the Court to accept the summary judgment motion attached to the motion for filing and for reconsideration of the February 25th order. On March 27th, plaintiff and counterclaim defendants filed a notice of appeal from the February 25th order that was entered on the docket on February 26th.

The Court finds that plaintiff has demonstrated inadvertence under Rule 60(b) and so will treat plaintiff's summary judgment motion as filed. The Court has reconsidered the February 25th order in light of plaintiff's submission and finds that the United States is still entitled to summary judgment.

While plaintiff correctly sets out that Arkansas law is used to determine the legal interest Rohn had in the property against which the tax lien is attached, federal law governs when the tax liens attached. As explained by the cited cases in the February 25th order, a state disclaimer law that is later invoked after the liens properly attached cannot remove those federal liens.

Hurt v. United States, 566 F.Supp. 356 (E.D. Ark. 1983), relied upon by plaintiff to illustrate that this Court has employed the "relation back doctrine," involved the effect of disclaimers of the surviving children and the children of a deceased child for purposes of a martial deduction to the surviving spouse when there were other grandchildren and great grandchildren that had

not executed disclaimers. Since different provisions of the federal tax code and the state law concerning descendants were implicated, *Hurt* is not applicable to this situation.

Accordingly, plaintiff's March 18th motion for relief/ reconsideration (#8) is denied. The United States is directed to submit a precedent for judgment granting the relief requested by the counterclaim within 20 days of the file-date of this order.

IT IS SO ORDERED this day of April, 1997.

s/ George Howard, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION DATED JULY 14, 1997

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CASE NO. LR-C-96-346

THE DRYE FAMILY 1995 TRUST
DANIEL M. TRAYLOR, Trustee

Plaintiffs,

v.

THE UNITED STATES OF AMERICA

Defendant and Counterclaim Plaintiff,

v.

THE DRYE FAMILY 1995 TRUST, DANIEL M. TRAYLOR as Trustee, ROHN F. DRYE, SUE C. DRYE, and THERESA K. DRYE.

Counterclaim Defendants.

JUDGMENT

In accordance with the order of this Court entered on April 4, 1997, denying the plaintiffs motion for reconsideration and granting the United States' Motion for Summary Judgment, it is HEREBY ORDERED that

1. Judgment is hereby entered in favor of the United States on its counterclaim and against the plaintiffs and the counterclaim defendants.

2. The plaintiffs' complaint is dismissed with prejudice.

3. Judgment is entered against Rohn F. Drye in the amount of $220,980, plus statutory interest, for outstanding Trust Fund Recovery Penalties for the periods ending December 31, 1988, December 31, 1989, and March 31, 1990, and in the amount of $91,952, plus statutory additions to tax, for federal individual income tax liabilities for his 1988 tax year.

4. That the United States is determined to have valid tax liens against all property and rights to property owned by Rohn F. Drye, or transferred by Rohn F. Drye to the Drye Family 1995 Trust; including all real and personal property conveyed in the estate of Irma Deliah Drye, and particularly against the $134,004.33, seized by levy on Stephens, Inc., Investment Bankers, and real property with the following legal description:

> The W1/2 of the SW1/4 of the SE1/4 of the SW1/4, Section 31, Township 3 North, Range 11 West, less and except the North 3 acres thereof.

5. It is further determined that Rohn F. Drye's purported disclaimer and transfer of real and personal property contained in the estate of Irma Deliah Drye, is invalid and of no effect, is fraudulent as against the United States; that the entity known as the Drye Family Trust is a mere nominee or alter ego of Rohn F. Drye; and that the purported disclaimer of interest by Rohn F. Drye is set aside and declared null and void;

6. The federal tax liens of the United States, attached to the property of the estate of Irma Deliah Drye, including the funds seized by levy and the real property described above, and are foreclosed.

7. Further, it is ordered that the real property described shall be sold and the proceeds of such Court-ordered sale, and the funds seized by levy be applied in satisfaction of the United States' aforementioned tax assessments.

Dated: _____ _____
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT STATUTES

26 U.S.C. § 6331(a)

§ 6331. Levy and distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

Ark. Code Ann. § 28-2-101

28-2-101. Right to disclaim interest in property.

(a) A person or a representative of a deceased, incapacitated, or incompetent person to whom any property or interest therein devolves, by whatever means, may disclaim it in whole or in part by delivering a written disclaimer under this chapter.

(b) A disclaimer may be of a fractional share or any limited interest or estate.

(c) The right to disclaim granted by this chapter shall exist irrespective of any limitations imposed upon the interest of the disclaimant in the nature of an expressed or implied spendthrift provision or similar restriction.

(d) This chapter does not abridge the right of any person to waive, release, disclaim, or renounce property or an interest therein under any other statute.

* * *

Ark. Code Ann. § 28-2-102

28-2-102. Waiver and bar.

The right to disclaim property or an interest therein is barred by:

(1) An assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor;

(2) A written waiver of the right to disclaim;

(3) An acceptance of the property or interest or a benefit thereunder;

(4) A sale of the property or interest under judicial sale made before the disclaimer is effected.

* * *

Ark. Code Ann. 28-2-108(a)

28-2-108. Effect of disclaimer generally.

(a)(1) If the property or interest devolved to a disclaimant under a testamentary instrument or under the laws of intestacy and the deceased owner or donee of a power of appointment has not provided for another disposition, it devolves as if the disclaimant had predeceased the decedent or, if the disclaimant was designated to take under a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power.

(2) Any future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had died before the event determining that the taker of the property or interest had become finally ascertained and his interest is indefeasibly vested.

(3) A disclaimer relates back for all purposes to the date of death of the decedent or of the donee of the power or the determinative event as the case may be.

Ark. Code Ann. § 28-9-203

28-9-203. Intestate succession generally.

(a) Any part of the estate of a decedent not effectively disposed of by his will shall pass to his heirs as prescribed in the following sections.

(b) In this connection, the terms "heir" and "heirs," as used in this subchapter, are intended to designate the person or persons who succeed by inheritance to the ownership of real or personal property in respect to which a person dies intestate.

(c) Real estate passes immediately to the heirs upon the death of the intestate, subject to the right of the personal representative under the probate code to mortgage, lease, exchange, sell, or possess it for the payment of claims or legacies, the preservation or protection of the assets of the estate, the distribution of the estate, or any other purpose in the best interest of the estate. However, personalty will pass to the personal representative, if any, for distribution to the heirs unless otherwise disposed of as permitted by the probate code.

* * *